No. 14781

United States
COURT OF APPEALS
for the Ninth Circuit

H. R. OSLUND,

Appellent,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge.

GARDNER AND REEDER,
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Hillsboro, Oregon;
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-56

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REPLY TO POINT NO. I

There is no substantial evidence to support the verdict.

Appellee claims that since the appellee's adjuster, Ed Engel, testified that he did not deny coverage, there was evidence that on issue (1), was there a denial of coverage, appellee did not deny coverage.

Assuming that the adjuster's testimony is true, nevertheless the appellee's own records, Plaintiff's Ex-

hibits 14 and 12, conclusively show that the claims committee of appellee denied coverage to A. L. Brock.

We submit that evidence cannot support the verdict on this issue.

Appellee claims that evidence supports the verdict on issue (2), was Brock operating the automobile at the time of the accident in the course of garage work. The evidence on this point is conclusive that at the time of the accident Brock was returning from getting eggs for his personal use. Appellee claims that evidence supports its contention that Brock was testing the car. Appellee admits that Exhibit 7 was offered for impeachment purposes and is not substantive evidence. However, appellee claims because at the trial Brock testified he tested the automobile in the morning and completed the work on the car in the morning (Tr. 31), and previously, on May 27, 1953, he had made a statement that he did not test the automobile (Tr. 35), grave doubts were cast as to whether he was road testing the automobile at the time of the accident.

The appellee apparently contends that because they managed to create grave doubts as to when the automobile was road tested, that grave doubts are sufficient evidence upon which to base a verdict. We submit such is not the law.

REPLY TO POINT NO. II

The court erred in admitting defendant's Exhibit 7.

Appellant and appellee agree that Exhibit 7 is not substantive evidence. The problem then is, was its ad-

mission proper for impeachment purposes. The exhibit itself does not impeach Lafky, since his unimpeached testimony was, Brock did not tell him that at the time of the accident he, Brock, was testing the car. Lafky testified that testing the car, was his impression, not what Brock told him. Nothing on Exhibit 7 indicates that Brock made such a statement to Lafky. The court in allowing the exhibit in effect permitted the jury to receive inadmissible evidence even for impeachment purposes, and declined to instruct the jury at the time of its reception that is was not substantive evidence. In fact, defense counsel claimed that it was evidence of what Brock allegedly told Lafky, and yet there was no evidence so identifying it. Appellee's position now on this point is contrary to the position asserted by it at trial. Counsel now admits it is not substantive evidence.

REPLY TO POINT NO. III

The court erred in submitting the question of garage exclusion to the jury.

Appellant submits that this point has been adequately covered in the appellant's brief and appellee's answering brief.

REPLY TO POINT NO. IV

The court erred in giving appellee's instruction.

We submit this point has been adequately covered in appellant's brief and appellee's answering brief.

REPLY TO POINT NO. V

The court erred in failing to give appellant's instruction 1.

We submit that the exclusion clause arising out of the operation of a garage is not free from ambiguity.

In *Barry vs. Sill,* 253 N.W. 14, the Supreme Court of Minnesota, in construing the exclusion clause, said:

> "There is a claim, not very seriously urged, that the words 'agents or employees' of a garage, used in the limitation provision of the policy, should exclude such agents and employees during the period of employment even when the accident occurred outside of their hours of service and when they were on personal trips for their own purposes and outside of their scope of employment. Under the well-known rule as to the construction of such insurance policies with reasonable strictness against the insurer, we do not so construe the policy."

In this case, at the time of the accident Brock was either getting eggs, testing the car, or getting eggs and testing the car. We submit that with an accident occurring under these facts, it is ambiguous to say that it arose out of the operation of a garage. Consequently, the court erred in failing to give appellant's requested instruction.

REPLY TO POINTS NO. VI AND VII

Appellee's counsel's argument of matters outside the record prejudiced appellant and prevented appellant from having a fair trial (Tr. 26).

(a) Appellee claims that counsel's arguing as to facts and matters not within the issues and upon which no evidence was presented is moot because the jury found for appellee.

We submit if the case were not on appeal that the argument would have merit. But since the case is on appeal, the remarks of appellee's counsel in closing argument is either grounds for a new trial or it is not. Certainly every person in the courts of the United States is entitled to a fair trial, and if the improper remarks of counsel deprive the other party of a fair trial, the appellate court will not hesitate to set aside the judgment and order a new trial. We submit the question has not yet become moot.

(b) Appellee claims appellant did not properly raise the question of appellee's counsel's improper argument. Counsel for appellant did object, and the court did consider the objection and allowed the argument. Counsel also raised the question on motion for a new trial to no avail. Appellant submits either the remarks were prejudicial or they weren't. Both appellee and the trial court know that argument was outside the record or it wasn't. Appellant submits that the argument was improper and prejudicial and that he is entitled to a new trial.

Appellee quotes *Thomson vs. Boles,* 123 F. 2d 487, cert. denied 315 U.S. 804, 62 S. Ct. 632, 86 L. Ed. 1204. The case is not in point. The matters argued were in evidence although not in issue. Furthermore, the arguments were allegedly appeals to sympathy provoked in part by the other party.

We submit the principle cited in *New York C. R. Co. vs. Johnson,* 279 U.S. 310, 73 L. Ed. 706, 49 S. Ct. 300, and the summary of Judge Learned Hand in *Brown vs. Walter,* 62 F. 2d 798, are applicable to the facts in this case.

(c) Appellee claims that because Brock had a policy on his own car with a garage exclusion and appellant had to sue on it, that it was proper for appellee's counsel to argue:

> "Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer any garage liability coverage. The record shows that his policy had lapsed and he knew about it and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that is outside of the record. Now there was a discussion between Mr. Engel and Mr. Brink . . . (Objection) (Tr. 26)."

We submit the argument is not a proper inference drawn from the fact that Brock's insurance company denied coverage, but is a recital of facts appellee claims were proven which were not, and were not issues in the case.

The fact that the trial judge ruled they were proper inferences did not make them so. To argue as proven by record facts which are not proven and which, if true, impute dishonesty, can have but one effect—prejudice.

CONCLUSION

Appellant concludes that the admissible evidence does not sustain the verdict. That the improper remarks of appellee's counsel and the failure of the trial court to strike them or attempt to offset them necessitates a new trial.

Respectfully submitted,

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